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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES DALESSANDRO,

Plaintiff and Appellant,

v.

ERIC ALBERT MITCHELL,

Defendant and Respondent.

B289365

(Los Angeles County
Super. Ct. No. BS138171)

APPEAL from orders of the Superior Court of Los Angeles County. Edward Moreton, Jr., Judge. Dismissed.

Law Offices of Paul S. Levine and Paul S. Levine for
Plaintiff and Appellant.

D. Joshua Staub for Defendant and Respondent.

On July 6, 2017, James Dalessandro was sanctioned in the amount of \$4,399 for filing a frivolous memorandum of costs. On December 4, 2017, he was again sanctioned \$4,875, for filing a frivolous motion for reconsideration. Dalessandro filed a notice of appeal on April 11, 2018, appealing from both sanctions orders. We dismiss the appeal because it is untimely.

PROCEDURAL BACKGROUND

In 2016, Dalessandro successfully amended a judgment to add Eric Mitchell as a judgment debtor.¹ In connection with the amended judgment, Dalessandro filed a memorandum of costs after judgment, acknowledgement of credit, and declaration of accrued interest. Mitchell moved to strike or tax costs, objecting to the approximately \$20,000 in attorney fees sought on the grounds they were excessive, unreasonable, and unsupported in law or fact. As part of his motion, Mitchell sought \$6,149 in sanctions under Code of Civil Procedure section 128.5² for filing a frivolous cost memorandum.

By order dated July 6, 2017, the trial court granted Mitchell's motion, finding Dalessandro had failed to justify the fees and costs sought. The trial court also imposed sanctions in

¹ This matter is related to case No. B286501, which is Mitchell's appeal from the trial court's denial of his motion to vacate the amended judgment. The trial court ordered the judgment to be amended to add Mitchell as a judgment debtor on July 5, 2016. Mitchell then attempted to vacate or set aside the amended judgment. The trial court denied Mitchell's motion to vacate the judgment on September 29, 2017 (see case No. B286501).

² All further section references are to the Code of Civil Procedure.

the amount of \$4,399 against Dalessandro and his attorney pursuant to Mitchell's request under section 128.5.³

Dalessandro timely moved for reconsideration of the July 6, 2017 order, arguing the trial court made erroneous findings to support its ruling. Dalessandro also contended sanctions were improvidently granted given the errors made by the trial court.

In his opposition to the motion for reconsideration, Mitchell again sought sanctions against Dalessandro and his attorney pursuant to sections 128.5 and 1008, subdivision (d). Mitchell asserted the motion for reconsideration failed to present any new facts or law and was simply a continuation of the previous frivolous motion.

By order dated December 4, 2017, the trial court again imposed sanctions in the amount of \$4,875 against Dalessandro for filing a frivolous motion. Dalessandro subsequently urged the court by letter to reconsider both sanctions orders on the ground Division 7 of this court issued a published opinion on January 31, 2018, holding that any motion for sanctions made under section 128.5 must be separately filed and served on the opposing party to allow him to withdraw or correct the challenged filing under a 21-day "safe harbor period." (*Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117, 127–128 (*Nutrition Distribution*).) Because Dalessandro was not afforded the protections specified in *Nutrition Distribution*, he asserted neither sanctions order was proper. By order dated April 11,

³ Dalessandro's attorney did not appeal from the sanctions orders. Mitchell asserts in a motion to dismiss that Dalessandro lacks standing to appeal from the sanctions orders because he did not pay any part of the sanctions; only his attorney paid. Dalessandro moves for sanctions against Mitchell for filing a frivolous motion on appeal. We deny both motions.

2018, the trial court chose to make no ruling in response to the letter for reconsideration.

Dalessandro filed a notice of appeal from the sanctions orders on April 11, 2018.

DISCUSSION

Mitchell moved to dismiss Dalessandro's appeal of both sanctions orders on the ground it was untimely. We agree the appeal was untimely as to both sanctions orders.

I. The Appeal from the July 6 Sanctions Order is Untimely

Dalessandro's appeal from the July 6 sanctions order is untimely because the notice of appeal was filed more than 180 days after the final judgment or appealable order was issued in this matter.

Section 904.1 codifies the general list of appealable orders and judgments, including the "one final judgment rule," which provides an appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.) An exception to the one final judgment rule includes sanctions orders exceeding \$5,000; such orders are immediately appealable under section 904.1, subdivision (a)(12). On the other hand, "[s]anction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." (§ 904.1, subd. (b).)

Here, the July 6 sanctions order did not exceed \$5,000; it fell \$601 short of that mark. As a result, it could only be reviewed after entry of the final judgment in the main action or by writ petition. (§ 904.1, subd. (b); see *San Bernardino Community Hospital v. Meeks* (1986) 187 Cal.App.3d 457, 462 [“A motion for sanctions, like a motion for attorney fees, . . . is a matter which is *collateral* to the underlying litigation.”].)⁴

We now turn to the issue of whether Dalessandro filed a timely appeal from the final judgment or from an appealable post-judgment order. The amended judgment adding Mitchell as a judgment debtor was entered on September 11, 2017. Mitchell then attempted to vacate or set aside the amended judgment. The trial court denied Mitchell’s motion to vacate the judgment on September 29, 2017 (see case No. B286501). That order ended the controversy between the parties and was an appealable order after judgment. (*Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933 [order on motion to vacate judgment is appealable order after judgment pursuant to section 904.1, subd. (a)(2)].)

⁴ At oral argument, counsel for Mitchell noted that Dalessandro would not have appealed from the September 29 order denying Mitchell’s motion to vacate the judgment because Dalessandro prevailed. He suggested instead the time to appeal the sanctions order began to run when the trial court issued the July 6, 2017 sanctions order. As we discussed above, an appeal is not allowable from a sanctions order that is less than \$5,000. (§ 904.1, subd. (b).) Under section 904.1, subdivision (b), Dalessandro had the choice to either file a petition for writ review or appeal after entry of judgment in the main action. The order ending the controversy was filed on September 29, 2017. He neither appealed from that order nor filed a petition for an extraordinary writ.

California Rules of Court, rule 8.104(a) sets forth the three possible deadlines to file a notice of appeal from a final judgment: 60 days after a party's notice of entry of judgment, 60 days after a clerk's notice of entry of judgment, or 180 days after entry of judgment.⁵

By our calculation, the very latest date a notice of appeal could have been filed for review of the July 6, 2017 sanctions order was March 27, 2018, 180 days from September 29, 2017. (Cal. Rules of Court 8.104(a)(1)(C), (c)(3), 8.108(c).)⁶ Dalessandro's notice of appeal was untimely filed on April 11, 2018. We are thus without jurisdiction to consider this appeal. (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101–1102.)

II. The Appeal from the December 4, 2017 Order Is Also Untimely

Dalessandro's appeal from the December 4, 2017 sanctions order, which stemmed from his motion for reconsideration of the July 6, 2017 order, was also untimely. An order denying a motion for reconsideration is not separately appealable; it is only appealable as part of an appeal from the underlying order.

⁵ The term “judgment” under rule 8.104 includes any appealable order. (Cal. Rules of Court, rule 8.104(e).)

⁶ This constitutes a very generous view of the time to file an appeal in this matter. A motion to vacate the judgment normally extends the time for a party to appeal by the earliest of three possible deadlines: 30 days after the superior court clerk or a party serves an order denying the motion; 90 days after the motion is filed; or 180 days after the entry of judgment. (Cal. Rules of Court 8.108(c); *Stein v. York* (2010) 181 Cal.App.4th 320, 324–325.)

Here, the appeal from the July 6, 2017 order was untimely. Because the December 4, 2017 order was merely an extension of the July 6, 2017 order the appeal from it was also untimely.

On December 4, 2017, the trial court granted Mitchell's second motion for sanctions in the amount of \$4,875. Notice of the ruling was served by the clerk on December 7, 2017. On February 9, 2018, the trial court issued a nunc pro tunc order which added the following rulings to the December 4, 2017 order due to clerical error: the motion for reconsideration was denied and attorney fees of \$2,560 were granted to Dalessandro. Notice of entry of the nunc pro tunc order was mailed by the clerk on February 13, 2018.

Dalessandro contends his time to appeal from the December 4, 2017 sanctions order began to run when the superior court clerk served the nunc pro tunc order on February 13, 2018. According to Dalessandro, his April 11, 2018 notice of appeal fell within 60 days of the clerk's notice and was timely. That is incorrect.

Regardless of when it was served, the December 4, 2017 order stems from a denial of a motion for reconsideration. Mitchell expressly based his request for sanctions on section 1008, subdivision (d), which provides: "A violation of this section [concerning motions for reconsideration] may be punished as a contempt and with sanctions as allowed by Section 128.7." The December 4 order denied the motion for reconsideration and imposed sanctions based on section 1008.

Thus, the December 4, 2017 order was not separately appealable. (§ 1008, subd. (g).) Instead, "if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of

an appeal from that order.” (§ 1008, subd. (g); *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1633.) This is because reconsideration involves further proceedings on the underlying motion and is simply a continuation of the hearing in which the reconsidered order was rendered. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1437–1438.) “Section 904.1 of the Code of Civil Procedure does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal.” (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1242.)

As we discussed above, the trial court denied Mitchell’s motion to vacate on September 29, 2017. That order was an appealable order after judgment. (*Carr v. Kamins, supra*, 151 Cal.App.4th at p. 933.) The motion for reconsideration was simply a continuation of the July 6, 2017 order. Thus, a timely appeal of the December 4, 2017 order rested on a timely appeal of the July 6, 2017 order. We have already determined the notice of appeal from the July 6, 2017 order was untimely. By extension, the appeal from the December 4, 2017 order was also untimely.

DISPOSITION

Dallessandro’s appeal from the July 7, 2017 sanctions order and the December 4, 2017 sanctions order is dismissed as untimely. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

STRATTON, J.

WILEY, J.